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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

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QUINTON P. BROWN,) NO. CV-08-5091-JPH

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Plaintiff,

v.) MOTION FOR SUMMARY JUDGMENT

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ELDON VAIL, et al.,

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MOTION FOR SUMMARY JUDGMENT

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BEFORE THE COURT is defendants' motion for summary judgment filed March 11, 2011 (Ct. Rec. 160). Plaintiff responded (Ct. Rec. 165-169) and defendants replied (Ct. Rec. 170-171). Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. §2000cc, filed on February 12, 2009 (Ct. Rec. 10). The parties consented to the magistrate judge's jurisdiction (Ct. Rec. 58).

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Plaintiff claims defendants Vail, Garringer, and Uttecht violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), thereby entitling him to permanent injunctive relief.

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Defendant presents two issues for summary judgment: (1) is plaintiff entitled to permanent injunctive relief under RLUIPA and the Prison Litigation Reform Act (PLRA); and (2) is plaintiff's request for injunctive relief requiring the Department of Corrections to provide him with matzah with his evening meal on

1 the first night of Passover moot? (Ct. Rec. 161). Defendants
2 subsequently filed a response brief, admitting the request for
3 matzah was not moot, because plaintiff was not provided with
4 matzah (Ct. Rec. 170). Defendants contend plaintiff has failed to
5 state a claim under RLUIPA that would entitle him to a permanent
6 order of prospective relief under the PLRA (Ct. Rec. 161).
7 Contrary to Defendants' assertions, there exist genuine disputes
8 of material fact regarding plaintiff's claim, and summary judgment
9 must be denied.

10 **I. Facts**

11 Plaintiff is not considered to be Jewish under Jewish law,
12 but he adheres to the religious tenets of Judaism, consuming a
13 Kosher diet and participating in Judaic religious observances.
14 (Ct. Rec. 10, 166). According to plaintiff, he has not been
15 provided with matzah or a Seder box, which contains the other
16 items necessary to observe a Seder ceremony as part of the Jewish
17 Passover holiday (Ct. Rec. 10).

18 Plaintiff is incarcerated in the Washington State
19 Penitentiary's (WSP's) Intensive Management Unit (IMU) (Ct. Rec.
20 159). Inmates are housed in the IMU as a result of "chronic
21 behavioral problems, extreme protective needs, or the presence of
22 a serious threat to the safety of staff or other offenders through
23 a pattern of violent or seriously disruptive behavior." (Ct. Rec.
24 162 1:19-22). IMU inmates are physically segregated from all other
25 inmates and the general population units. The IMU has the highest
26 level of physical security of any housing unit offered in the WSP
27 (Ct. Rec. 162). At no time is an IMU inmate permitted to be
28 unrestrained and in open air contact with staff or other

1 offenders; instead, the inmate must be escorted by two staff
 2 members while his or her wrists are restrained, and any activity
 3 out of the cell is performed behind a secure door or grille gate
 4 (Ct. Rec. 162).

5 Plaintiff claims defendants violated RLUIPA by failing to
 6 provide him with matzah and a Seder box, and he is subsequently
 7 entitled to permanent injunctive relief pursuant to the PLRA (Ct.
 8 Rec. 10). Defendants' motion for summary judgment contends
 9 plaintiff failed to state a claim under RLUIPA and therefore is
 10 not entitled to such relief (Ct. Recs. 160-161). Plaintiff filed
 11 various documents on April 18, 2011, which purport to show genuine
 12 issues of material fact regarding his claim (Ct. Recs. 165-168).
 13 In turn, defendants filed their reply memorandum on April 22,
 14 2011, alleging plaintiff was raising "conclusory or speculative
 15 allegations," not "[g]enuine issues of material fact" (Ct. Rec.
 16 170).

17 **II. Summary Judgment Standard**

18 Summary judgment is granted when the moving party can show
 19 there is "no genuine dispute as to any material fact," and is
 20 therefore "entitled to judgment as a matter of law." Fed. R. Civ.
 21 P. 56(a).¹ Rule 56 allows the court to dispose of claims that are
 22 factually unsupported, and enter summary judgment against the
 23 party who has failed to sufficiently establish the existence of an
 24 essential element of his case, which he would bear the burden of

25 ¹While the rule was amended in 2010 from "no genuine issue"
 26 to "no genuine *dispute*," the standard for granting summary
 27 judgment is unchanged. Fed. R. Civ. P. 56, Advisory Committee
 28 Notes (2000) (emphasis added). The term "dispute" was used to
 replace "issue," in order to reflect the "focus of a summary-
 judgment determination." *Id.* What was formerly subdivision (c) is
 now subdivision (a). *Id.*

1 proving at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-
2 323, 323-24 (1986). This is because a "complete failure of proof
3 concerning an essential element of the nonmoving party's case
4 necessarily renders all other facts immaterial." *Id.* at 322-23.

5 "Material facts" are those that are "relevant to an element
6 of a claim or defense and whose existence might affect the outcome
7 of the suit." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors
Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). There is no "genuine
9 dispute" regarding a material fact unless there is sufficient
10 evidence for the jury to return a verdict for the nonmoving party.
11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The
12 court's inquiry at summary judgment is therefore whether a
13 reasonable jury could find by the preponderance of the evidence
14 that the nonmoving party is entitled to a verdict. *Id.* at 252.
15 This requires the evidence necessary for a jury to reasonably find
16 for the nonmoving party; not simply a "scintilla" of evidence
17 supporting the position of the nonmoving party." *Id.* at 252.

18 Both parties must support their positions by citing to the
19 record or other materials, including depositions, affidavits,
20 declarations, and interrogatory answers, or by showing that the
21 opposing party and/or the cited materials have not or are unable
22 to "establish the absence or presence of a genuine dispute." Fed.
23 R. Civ. P. 56(c)(1). The inferences drawn from the underlying
24 facts of the case are "viewed in the light most favorable" to the
25 nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio
Corp.*, 475 U.S. 574, 587 (1986). When the moving party meets its
26 initial burden of showing that there is no "genuine dispute," the
27 nonmoving party must show there is some genuine dispute for trial.
28

1 *Anderson*, 477 U.S. at 250. Submitting conclusory allegations in an
2 affidavit is not sufficient to defeat summary judgment; for
3 instance, the Court held insufficient a plaintiff's allegation of
4 a conspiracy without "any significant probative evidence tending
5 to support the complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S.
6 871, 888 (1990); *Anderson*, 477 U.S. at 249. The nonmoving party
7 must produce "at least some significant probative evidence tending
8 to support the complaint." *T.W. Elec. Serv., Inc.*, 809 F.2d at
9 630.

10 When the nonmoving party has not carried his burden of proof
11 by making a "sufficient showing" on an "essential element" of his
12 case, the moving party is "entitled to judgment as a matter of
13 law." *Celotex Corp.*, 477 U.S. at 323. However, if the evidence is
14 such that a "rational trier of fact *might* resolve the issue in
15 favor of the nonmoving party," the court must deny summary
16 judgment. *T.W. Elec. Serv., Inc.*, 809 F.2d at 631 (emphasis
17 added).

18 **III. RLUIPA**

19 Plaintiff claims defendants violated RLUIPA by not providing
20 him with matzah or a Seder box in order to observe a Seder
21 ceremony for the Passover holiday.

22 The government shall not "impose a substantial burden on the
23 religious exercise of a person residing in or confined to an
24 institution, . . . even if the burden results from a rule of
25 general applicability, unless the government demonstrates that
26 imposition of the burden on that person" is both "in furtherance
27 of a compelling government interest," and "is the least
28 restrictive means of furthering that compelling government

1 interest." 42 U.S.C. §2000cc-1(a). "Religious exercise" is
2 inclusive of "any exercise of religion, whether or not compelled
3 by, or central to, a system of religious belief." 42 U.S.C.
4 §2000cc-5(7)(A). This provision "does not differentiate between
5 bona fide faiths," nor does it confer privileged or
6 disadvantageous treatment on any "bona fide faith." *Cutter v.*
7 *Wilkinson*, 544 U.S. 709, 723-24 (2005).

8 While the scope of activities deemed to be "religious
9 exercises" may appear broad, what is considered to constitute a
10 "substantial burden" is not. A "substantial burden" on religious
11 exercise is one that "impose[s] a significantly great restriction
12 or onus upon such exercise." *Warsoldier v. Woodford*, 418 F.3d 989,
13 995 (9th Cir. 2008). A "substantial burden" is more than an
14 inconvenience; it is a denial of "an important benefit because of
15 conduct mandated by religious belief, thereby putting substantial
16 pressure on an adherent to modify his behavior and to violate his
17 beliefs." *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*,
18 456 F.3d 978, 988 (9th Cir. 2006); *Shakur v. Schriro*, 514 F.3d
19 878, 888 (9th Cir. 2008). Even if such pressure is indirect, the
20 infringement upon religious exercise is deemed to be
21 "substantial." *Warsoldier*, 418 F.3d at 995.

22 When analyzing a claim under RLUIPA, the religious exercise
23 the plaintiff claims has been infringed upon must be identified;
24 then, it must be determined whether the prison regulation at hand
25 substantially burdened the exercise. *Greene v. Solano County Jail*,
26 513 F.3d 982, 987 (9th Cir. 2008). Once that showing has been
27 made, it is up to the defendant to establish that the burden is in
28 furtherance of a "compelling governmental interest," and is the

1 "least restrictive means" to achieve that interest. *Id.* at 988.
2 If the defendants are able to meet that standard, regardless of
3 the burden imposed on plaintiff's religious exercise, the burden
4 is permitted under RLUIPA. *Id.* at 990.

5 The religious exercise at issue is a Seder ceremony, in
6 accordance with plaintiff's Jewish beliefs (Ct. Rec. 173).
7 Defendants claim plaintiff's religious exercise has not been
8 substantially burdened by the prison's failure to provide him with
9 matzah or a Seder box, because he has four available alternatives
10 for receiving such materials (Ct. Rec. 161). According to
11 defendants, Mr. Brown may obtain a Seder box by: (1) contacting
12 Jewish Prisoner Services International (JPSI) or the Aleph
13 Institute to request one, (2) finding a different outside vendor
14 willing to provide a Seder box, (3) participating in a group Seder
15 ceremony at the prison, or (4) having a Seder box sent to him in
16 his quarterly package (Ct. Rec. 161).

17 Mr. Brown asserts that, on the contrary, none of the avenues
18 proffered by defendants are viable in his particular case (Ct.
19 Rec. 165). Plaintiff contacted the Aleph Institute to request a
20 Seder box for Passover 2011, and his request was denied because he
21 is not considered Jewish by the Institute's standards (Ct. Rec.
22 166). Additionally, JPSI will not sell Seder boxes to "non-Jewish"
23 inmates; the possibility of requesting a Seder box from JPSI or
24 the Aleph Institute is foreclosed. Plaintiff indicates he has
25 sought other outside vendors from which to obtain a Seder box, but
26 to no avail (Ct. Rec. 166). As to the option of a group Seder
27 ceremony, defendants readily admit participating in a group Seder
28 is not a viable option for plaintiff because he is confined to the

1 IMU and restricted from coming into contact with other inmates
2 (Ct. Rec. 162). Finally, plaintiff contends it is not possible to
3 have a Seder box sent to him in his quarterly package, as he has
4 no living family to send him such a package (Ct. Rec. 166).

5 Viewing the pleadings presented in the light most favorable
6 to plaintiff, there appears to be a genuine dispute regarding
7 whether his religious exercise is substantially burdened.

8 Plaintiff asserts if the prison will not provide him a Seder box
9 and matzah, he has no other viable option for obtaining the
10 materials to observe a Passover Seder. RLUIPA was designed to
11 protect those who are institutionalized and subsequently unable to
12 attend to their own religious needs, and must rely on permission
13 and accommodation from the government. *Cutter*, 544 U.S. at 721.
14 Plaintiff claims his ability to engage in a Seder ceremony will be
15 entirely foreclosed; a rational trier of fact could conclude that
16 foreclosing Mr. Brown's ability to observe a religious ceremony is
17 a substantial burden on his religious exercise. As such, there is
18 a genuine dispute as to whether plaintiff's religious exercise is
19 being substantially burdened.

20 Despite the dispute regarding the alleged burdening of
21 plaintiff's religious exercise, defendants would meet their burden
22 of proof for summary judgment if they could show they were
23 furthering a "compelling government interest" using the "least
24 restrictive means." 42 U.S.C. §2000cc-1(a) (2000). In determining
25 whether defendants were furthering a "compelling government
26 interest" when they fail to provide matzah and other Seder
27 materials, context matters; RLUIPA does not "elevate accommodation
28 of religious observances over an institution's need to maintain

1 order and safety. . . ." *Cutter*, 544 U.S. at 722-23. RLUIPA's
2 drafters expected courts would show "due deference to the
3 experience and expertise of prison and jail administrators" for
4 establishing regulations in order to maintain security while
5 operating under budgetary constraints. *Id.* at 723. Consequently,
6 the maintenance of "good order, security and discipline,
7 consistent with consideration of costs and limited resources" has
8 been found a "compelling government interest." *Shakur*, 514 F.3d at
9 889.

10 The policy of the Washington State Penitentiary prior to 2008
11 was to purchase Seder boxes for inmates who did not qualify to
12 receive a donated Seder box from an outside religious services
13 provider (Ct. Rec. 162 paragraph 15). The prison changed this
14 policy in 2008, when fewer than 50 of the 418 offenders who
15 requested Seder boxes were deemed Jewish under Jewish law by the
16 outside religious services provider (Ct. Rec. 162). Defendants
17 assert the prison did not provide Seder materials to plaintiff, or
18 any other inmate, because they now believe such practice would
19 violate the Washington State Constitution, and, there was no
20 longer a source from which to purchase the necessary number of
21 Seder boxes for requesting prisoners (Ct. Rec. 161).

22 Defendants claim purchasing Seder boxes for inmates would
23 violate Article 1 Section 11 of the Washington State Constitution,
24 because it provides that "[n]o public money or property shall be
25 appropriated for or applied to any religious worship, exercise or
26 instruction, or the support of any religious establishment," with
27 the exception of chaplains employed by the State. Wash. Const.
28 Art. 1 §11. When public money is used for a purpose that is

1 religious in nature, and lacks a purpose that is secular, the use
2 is deemed impermissible. *Malyon v. Pierce Co.*, 935 P.2d 1272, 1282
3 (Wash. 1997). According to plaintiff, while some of the items
4 contained in a Seder box may normally be considered foods, they
5 are ritual items specifically required for a Seder ceremony (Ct.
6 Rec. 165). The court may be persuaded defendants were advancing a
7 compelling interest in refusing to purchase a Seder box for
8 plaintiff, but defendants have not established that the interest
9 was being furthered by the least restrictive means. Additionally,
10 although defendants addressed the denial of a Seder box, they did
11 not provide a compelling government interest to justify the denial
12 of matzah. Matzah is a food item that replaces regular leavened-
13 bread in the diets of those observing Passover, and while it may
14 have religious significance, it also serves a nutritional one.
15 (Ct. Rec. 165). Defendants have offered no compelling government
16 interest to justify the denial of matzah to plaintiff.

17 A challenged government action that imposes a substantial
18 burden on religious exercise must not only be supported by a
19 "compelling government interest," but it must be accomplished
20 using the "least restrictive means." 42 U.S.C. §2000cc-1(a)(1).
21 For a prison to prove that it has implemented the least
22 restrictive means, it must show that it "actually considered and
23 rejected the efficacy of less restrictive measures before adopting
24 the challenged practice." *Warsoldier*, 418 F.3d at 999. This
25 requires a prison to provide "detailed evidence, tailored to the
26 situation before the court, that identifies the failings in the
27 alternatives advanced by the prisoner." *Id.* at 1000. Plaintiff
28 suggests that, as an alternative to purchasing a Seder box, the

1 prison could assemble such a box on its own (Ct. Rec. 165).
2 Defendants have shown consideration of one alternative to the
3 cessation of providing Seder boxes--purchasing Seder boxes for
4 offenders not eligible to receive a donated one from Aleph
5 Institute (Ct. Rec. 162). Defendants have not, however,
6 illustrated why the prison's assembly of a Seder box is not the
7 least restrictive means of advancing the government's allegedly
8 compelling interest. There exists a genuine dispute as to whether
9 the government is employing the least restrictive means, a fact
10 material to plaintiff's RLUIPA claim.

11 **IV. Conclusion**

12 There exist genuine disputes of material fact regarding
13 whether plaintiff's religious exercise was substantially burdened,
14 as well as whether there was a compelling government interest
15 advanced using the least restrictive means to justify the burden.
16 As a result, defendants' motion for summary judgment (Ct. Rec.
17 160) is **DENIED**.

18 A telephonic scheduling conference to set a trial date will
19 be set by separate order.

20 DATED this 19th day of May, 2011.

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22
23 s/ James P. Hutton
24 JAMES P. HUTTON
25 UNITED STATES MAGISTRATE JUDGE
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